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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

Nos. 870 and 871.

ROBERT B. CURTIS et al., and MICHAELA GRAND et al.,
Petitioners,

vs.

WILLIAM BOEGER, Warden, St. Louis City Jail,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

PETITIONERS' STATEMENT.

This Court denied Petitioners' Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit on February 13, 1967, case numbers 870 and 871. Now within twenty-five days after judgment, Petioners request a rehearing of their cases based on newly discovered evidence and matters relating to the fairness of their trials not previously presented.

GROUNDS FOR REHEARING.

I.

Prejudicial Conduct by Special Prosecutors and Right to Fair Trial.

1. During the trial of **Curtis et al.**, No. 870, Wayne Millsap, special prosecutor for the Court, pointed out passages to Judge Scott of the previous day's testimony by Joseph McConnell. When counsel for the defense requested to see that part of the previous day's transcript for impeachment purposes on cross-examination, the Court refused to allow it and overruled the request (Tr. C. 129-132):

Page 129: JOSEPH H. McCONNELL, having previously been sworn as a witness on behalf of the plaintiff, continues his testimony as follows:

Mr. Millsap: If your Honor please, here is the original deposition of Mr. McConnell, if Your Honor would like to follow the inquiry. Mr. Cahill is now interrogating in connection with the deposition.

Mr. Wilson: Judge, you have the daily transcript from the testimony of yesterday, I haven't looked at it or any thing

Page 130: may we use it?

The Court: I don't know about that, it's been just loaned to me, I don't know what the circumstances are.

Mr. Wilson: We are getting ready to use the deposition and we want to compare the testimony of yesterday with this deposition.

The Court: Mr. Millsap?

Mr. Millsap: I am sorry, I didn't hear.

Mr. Wilson: There is a daily transcript that is being prepared of the testimony?

Mr. Millsap: I am having a daily copy, that is true. Are you having daily copy, too?

Mr. Wilson: No, we are not.

Mr. Millsap: I see.

Mr. Wilson: We simply want to use it.

The Court: He is requesting—the Court, I believe, received yesterday's copy. But what is your attitude?

Mr. Wilson: Mr. Gore is acting here as official Court Reporter, Your Honor. This is not the same case as concerned with Miss Hughes here. Mr. Gore is acting as the daily Court Reporter, the daily transcript he made of the proceedings here, I think we are entitled to use.

Mr. Millsap: No, Your Honor, that is not correct. Your Honor, the copy of the transcript is being made at special request, and I know, Mr. Wilson knows and Your Honor knows that

Page 131: preparation of daily copy is quite an expensive process, and is being paid for by us. A daily copy is not a proper taxable charge, Your Honor, and it is something that we are privately employing the reporters to do, and I don't think I should be compelled to furnish this service at our cost to Mr. Wilson and the defendants.

The Court: The Court will overrule you at this time.

Mr. Wilson: All right, sir.

Mr. Millsap: Now, might I say, Your Honor——

Mr. Wilson: Now, if the Court please, I would also like to make a statement for the record——

The Court: Mr. Millsap was going to say something.

Mr. Millsap: I might say, Your Honor, that I would have no objection, Your Honor, at all, if Mr. Wilson or any of the defendants would like to make arrangements with the Court Reporter to purchase daily copy from the Court Reporter. I would not want to deny them, Your Honor, but I do not feel that we should be compelled to pay for their use of this copy which we are paying for.

Mr. Wilson: If the Court please, I would like to further point out to the Court that this is not a case of the bank

versus these alleged contemnors. As I understand from what transpired here yesterday, Mr. Millsap has been especially appointed by this Court to present these proceedings, so that the copy doesn't belong to Jefferson Bank; it belongs to this

Page 132: Court

Mr. McDuffie: I would like to further point out, if Your Honor please, this is a Court of Record, and this is the official testimony taken in this hearing, and it is public information, it's the Court's information, it's the State's information and the defendants would have a right to the transcript of the testimony here taken.

The Court: It will be overruled.

Mr. Millsap was allowed to take unfair advantage of the defendants simply because Jefferson Bank had the financial resources to purchase a daily transcript from the court reporter. Petitioners were not given a chance to show that they could not afford a daily transcript. **Griffin v. Illinois,** 351 U. S. 12. In addition petitioners have no way of determining what portions of the previous day's testimony were pointed out to Judge Scott and therefore were not given a chance to correct any erroneous impressions. Furthermore, there seems to be considerable merit in defense counsel's contention that in view of the fact that Millsap had been appointed to represent the Court, the daily transcript also belonged to the Court and should have been made available to both sides.[1] **Jencks v. United States,** 353 U. S. 657; **Giles v. Maryland,** No. 27, decided February 20, 1967.

2. Mr. Millsap having led petitioners in **Curtis et al.,** No. 870, to believe that the charges were for **civil contempt,** took their depositions on the 7th and 8th of September,

[1] Also see Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? Washington U. L. Q., June, 1963 and Goldstein, Advantage in Criminal Procedure, 69 Yale Law Journal 1149, 1180-85.

1963, under the rules of civil procedure (Tr. C. 39; 9/3/63). Then on the 18th of September, Millsap requested Judge Scott to appoint him as special prosecutor for the Court and authorize the issuance of notices of **criminal contempt** and their service on petitioners in **Curtis et al.** and four others. (See Exhibit A.) Then at the trial, Mr. Millsap introduced in evidence selected parts of the depositions as "admissions against interest" (Tr. C. 1127). Defense counsel objected to their admission but were overruled (Tr. C. 1135-44). Thus petitioners' right not to give evidence against themselves as protected by the Fifth and Fourteenth Amendments, was effectively undercut by trickery and deception on the part of Mr. Millsap.

Petitioners are now asking this Court to consider the foregoing in light of **Garrity v. New Jersey** and **Spevack v. Klein**, decided January 16, 1967.

3. Petitioners were never able to uncover the significance of John Montrey's appearance to assist Wayne Millsay in the trial of **Grand et al.**, No. 871. It was impossible for defense counsel to ascertain the amount or the source of remuneration the special prosecutors were to receive for their work. Mr. Montrey even stated that he could not reveal to the Court the source of his fee. This in spite of the fact that Judge Scott appointed him to assist Mr. Millsap (Tr. G. 21):

Page 21: Mr. Montrey: Major Eitzman, on or about October 7, 1963—

Miss Younge: Your Honor please, I would like to at this time ask the Court to direct Mr. Montrey to state how he is appearing in this case, by whom he is employed, and whether or not he's receiving remuneration for his services here and by what means he is in this case.

Mr. Montrey: If the Court please, I consider the request, perhaps, to be improper but I certainly have no objection to indicating why I am here. I was appointed with Mr. Millsap by Your Honor to present evidence in

this matter on October 7, 1963. I trust that I will be remunerated for my services, but I don't know that I can discuss that with Your Honor or with Miss Younge. I have been engaged to be of assistance to Mr. Millsap in the presentation of this matter as well as being appointed by Your Honor.

The Court: Proceed.

Miss Younge: Do I understand counsel's answer to mean that he is not employed by the bank, by the Jefferson Bank & Trust Company, he is not an attorney for the bank?

The Court: The record shows that he's attorney in this matter, so you may proceed.

Mr. Montrey's enigmatic statement, "I trust I will be remunerated for my services," indicates that he (and Millsap) may have undertaken the prosecutions on a contingent fee basis. If this is the case, such an arrangement was inherently prejudicial to the constitutional rights of the petitioners and also a violation of R. S. Mo., 1959, Secs. 56.110 and 56.130[2] and the Canons of Ethics, R. S. Mo., 1959, Supreme Court Rule 4.06.[3] The compensation

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[2] Sec. 56.110. **"If interested in case, court to appoint substitute.**—If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office . . . the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause." Sec. 56.130. "**Power of appointee.**—The person appointed shall possess the same power as the proper officer would if he was present and shall receive a reasonable fee for each case prosecuted to be fixed by the court and to be taxed and paid as other costs in criminal cases."

[3] Supreme Court Rule 4.06. "**Adverse Influences and Conflicting Interests.** It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel." Judge Scott appointed Mr. Montrey to represent the Court in the interest of law and justice. Having been appointed by the Court, Montrey declined to reveal the source of his fee to the judge and opposing counsel.

of prosecuting attorneys in Missouri is fixed by law and is not dependent on the number of cases prosecuted or convictions obtained. See R. S. Mo., 1959, Secs. 56.260, 56.270, 56.280. In **Tumey v. Ohio**, 273 U. S. 510, this Court held that a trial before a judge who receives his fee only if the defendant is convicted is inherently lacking in due process. **Tumey** is analogous to the cases at bar, if the special prosecutors' fees depended on a finding of guilty by the trial judge. Also the identity of the special interest groups who subsidized the convictions of petitioners remains a mystery.

4. Petitioners also contend that Wayne Millsap violated Missouri Supreme Court Rule 4.16,[4] by failing to restrain officers of Jefferson Bank from denouncing petitioners over the radio and television and in newspaper advertisements (See Exhibit B published October 11, 1963 in the Post Dispatch, Globe Democrat, Argus, and American, during the trial of **Grand et al.** and before judgment was rendered against petitioners on October 24 and 25, 1963).

Allegations of additional prejudicial conduct by Mr. Millsap can be found on pages 25-33 of the Petition for a Writ of Certiorari and pages 12-15 of Petitioners' Reply Brief. In the event an evidentiary hearing is granted, this material and more can be introduced into evidence.

II.

Newly Discovered Evidence.

The United States District Court below, without holding an evidentiary hearing, concluded that it was the peti-

[4] Supreme Court Rule 4.16 **"Restricting Clients from Improprieties.** A lawyer should use his best efforts to restrain his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation."

tioners who were guilty of racial discrimination and as such their demand on the bank was unlawful. The District Court then used this finding to support its judgment that jurisdiction rested in the state court and not the NLRB because there was no "bona fide labor dispute." 240 F. Supp. 475, 481.

Petitioner Curtis received a letter on January 29, 1967 from Peter C. Robertson, Executive Director of the Missouri Commission on Human Rights, indicating that he could resolve this issue in favor of petitioners if an evidentiary hearing is granted (See Exhibit C).

III.

Evidentiary Hearing.

The United States Court of Appeals remanded this case to the United States District Court for a determination as to whether an evidentiary hearing was required under the doctrine in **Townsend v. Sain,** 372 U. S. 293. See **Curtis v. Boeger,** 331 F. 2d 675. The United States District Court and the United States Court of Appeals below held that no facts were in dispute and that the dispute relates only to conclusions of law, **In Re Curtis' Petition,** 240 F. Supp. 475, 486, and **Ford v. Boeger,** 362 F. 2d 999, 1003 and dismissed the petitions for habeas corpus on the merits denying an evidentiary hearing.

However, the holding in **Townsend v. Sain,** supra, does not make factual dispute the sole basis for granting an evidentiary hearing. In **Townsend** this Court stated:

> "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding proce-

dure employed by the state court was not adequate to afford a full and fair hearing; (4) **there is a substantial allegation of newly discovered evidence**; or (5) **the material facts were not adequately developed at the state-court hearing**; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." (Emphasis supplied) 372 U. S. at page 313.

1. The following factual disputes have been raised during the course of litigation through the state and federal courts:

(a) The Court below has held at 362 F. 2d 999, 1001, that petitioners did not raise their First Amendment claims in the state court. However, petitioners have pointed out that the St. Louis Court of Appeals specifically ruled on that question in **Curtis v. Tozer**, 374 S. W. 2d 557, 595. See Petition for a Writ of Certiorari, page 9.

(b) The Court below at page 362 F. 2d 999, 1003, held that "petitioners blocked the entrances to the bank by standing in front of the entrance, locking arms and blocked entrance to the tellers' windows by sitting and lying in front of such windows." Petitioners deny this and respondent has not and cannot point to a single page number of the trial proceedings to support it. See page 11 of Petition for Writ of Certiorari.

(c) The Court below at page 62 F. 2d 999, 1008 in footnote No. 3 held, "At the time the sentences were imposed the repetitive violent demonstrations created a situation which required effective states action to reestablish law and order." There was not one word of testimony in the transcript indicating violent conduct. And if there had been respondent would surely have pointed it out to the Court. In fact all of the testimony proved that the picket line was peaceful. See page 15 of Petition for a Writ of Certiorari and Appendix D therein.

This disputed finding by the Court below is crucial in light of the fact that the Court below admitted that only violent conduct could have been enjoined by the state court, stating, "Examination of the record before us shows that only violent conduct within the scope of matters left to state jurisdiction is here enjoined". 362 F. 2d 999, 1005. And the Missouri Supreme Court has made the same holding in **United Brick and Tile Division v. Wilkinson**, 325 S. W. 2d 50, 55. See Petitioners' Reply Brief, page 7.

2. The Court below at page 362 F. 2d 999, 1003, stated, "No error was committed in denying an evidentiary hearing. At a pretrial conference called to consider the necessity of an evidentiary hearing, petitioners limited their request to produce additional evidence to the following items: (1) The nature and extent of the alleged labor dispute between CORE and the bank. (2) Bias and prejudice on the part of special prosecutor Millsap. (3) Discriminatory hiring practices of the bank.

"It appears that full opportunity was afforded in the state court to present evidence upon each of said points, and no showing has been made that the proposed additional evidence would be material upon any controlling issue before us." This statement is erroneous and in violation of **Townsend v. Sain**, supra. The following "material facts that were not adequately developed at the state court hearing or the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing", 372 U. S. 293, 313:

(a) The trial judge refused to permit evidence pertaining to the nature of the dispute and the issue of Federal preemption raised in petitioners' pleadings (Tr. C 59-74a). This ruling by the trial Court violated the due process requirements of the Fourteenth Amendment. **In**

Re Green's Petition, 369 U. S. 689 at pages 692-3. See Petition for Writ of Certiorari, page 20.

(b) Petitioners were not able to produce evidence pertaining to the prejudicial conduct of Millsap, Montrey, and officials of Jefferson Bank, some of which occurred outside of the court room and after the completion of the trials, but before judgment was rendered. In addition, petitioners were not permitted to develop facts pertaining to the financial interest of the special prosecutors in the contempt trials, the source and amount of their fees and their other tactics which petitioners claim denied them a fair trial. See part I, supra, and Petition for a Writ of Certiorari, pages 25-33.

(c) The Court below at page 362 F. 2d 999, 1008, states: "It is undisputed that Peake is a paraplegic and that he cannot move without the aid of a wheel chair . . . There is no record before us with respect to any undue hardship suffered by Peake in serving his sentence. Statements in brief without record support cannot be considered." Thus, Peake's claim under the Eighth Amendment was denied because of lack of evidence.

If an evidentiary hearing is granted, petitioners will have an opportunity to show the following: (1) the general state of Peake's health; (2) the difficulty he has in using jail toilet facilities; (3) the difficulty he has in moving into and out of his cell and into the bullpen; (4) the crowded conditions of the jail; (5) the type and quality of food served at the jail; (6) his susceptibility to illness.

4. Pursuant to the holding in **Townsend v. Sain,** supra, at page 313, petitioners assert that they can now present a substantial allegation of newly discovered evidence. This point was discussed at part II, supra.

Petitioners believe that the Court below erred in holding at 362 F. 2d 999, 1003, that "no showing has been made

that the proposed additional evidence would be material on any controlling issue before us." It seems clear as heretofore stated that (1) the factual question of petitioners' conduct and the existence or non-existence of violence is of supreme and controlling importance as to the issues of federal preemption and petitioners' right to free speech and peaceable assembly, (2) evidence pertaining to the interest, bias, conduct, conditions of employment as special prosecutor, statements to the news media, etc., by Wayne Millsap, John Montrey and officers of Jefferson Bank is of vital importance in determining whether or not petitioners' right to a fair and impartial trial were violated, (3) evidence pertaining to the nature of the dispute between Jefferson Bank and CORE is of paramount importance on the issue of state versus NLRB jurisdiction, (4) petitioners' allegations of newly discovered evidence directly contradicts an important holding of the United States District Court pertaining to the identity of the party guilty of racial discrimination, (5) evidence as to the health and physical condition, etc., of James Peake is vital to his claim of cruel and unusual punishment in violation of the Eighth Amendment.

It is important to note that several of petitioners' claims were rejected by the U. S. Court of Appeals on the ground that there is insufficient evidence to support them, while at the same time denying an evidentiary hearing.

If this procedure is sanctioned, then no evidentiary hearing would ever be held because if a transcript already contained the necessary information to support petitioner's claims he doesn't need one and if the record is deficient in this regard his claim can be rejected for lack of evidence. Therefore petitioners request that their cases be considered in light of **Pate v. Robinson**, 383 U. S. 375; **Miller v. Pate** and **Zuckerman v. Greason**, No. 71, decided February 13, 1967; **Kimbo v. Heer**, No. 751, Misc. decided February 20, 1967.

CONCLUSION.

Petitioners are not now requesting a hearing on the merits. They only ask for a day in court—an evidentiary hearing in which they might have an opportunity to establish the claims set out herein and in their Petition for a Writ of Certiorari.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is based on grounds which are confined to intervening circumstances of substantial or controlling effect and on other substantial grounds available to Petitioners although not previously presented.

.....
Robert B. Curtis,
Attorney for Petitioners.